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17 *by Julie Leeks Deputy*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

11 Alva and Alberta Pilliod,

12 Plaintiffs,

13 vs.

14 Monsanto Company,

15 Defendant.

Case No.: RG17862702

PLAINTIFFS' TRIAL BRIEF ON CAUSATION JURY INSTRUCTIONS

Hon. Winifred Smith
 Dept. 21
 Trial Date: March 18, 2019

I. INTRODUCTION

California courts have concluded that “the unknown and mysterious etiology of cancer is beyond the experience of laymen and can only be explained through expert testimony. *Cooper v. Takeda Pharm. Am., Inc.*, 239 Cal. App. 4th 555, 578, 191 Cal. Rptr. 3d 67, 85 (2015). If the expert testimony establishes “a reasonably probable causal connection between an act and a present injury” the issue of causation must be submitted to the jury. *Id. quoting Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at p. 403, 209 Cal.Rptr. 456.). Under California law, an expert is not required to exclude all other possible causes of cancer in order to reach a specific causation opinion. *Cooper*, 239 Cal. App. 4th at 578. Rather, plaintiff must simply present evidence “from which a reasonable fact finder may conclude that defendant's conduct probably was a substantial factor in bringing about the harm.” *Uriell v. Regents of Univ. of California*, 234 Cal. App. 4th 735, 746, 184 Cal.

1 Rptr. 3d 79, 86 (2015)

2 Plaintiffs' experts have offered testimony that while other risk factors, such as obesity, may
3 have contributed to the Pilliods' development of NHL the most substantial contributing factor was
4 their exposure to glyphosate-based herbicides. Defendants' experts, however, will testify that there
5 are other independent causes, such as immunodeficiency and skin cancer, that are responsible for
6 causing the Pilliods' cancer. Thus, the jury will be presented with evidence of multiple possible causes
7 of the Pilliods' NHL. The evidence could support a finding of either concurrent independent causes
8 or concurrent dependent causes. Under these circumstances, the Court should instruct the jury on
9 multiple causation by giving CACI 431 (Causation: Multiple Causes) while excluding the optional
10 last sentence of CACI 430.

11 **II. ARGUMENT**

12 **A. Evidence of Multiple Causation**

13 Plaintiffs' expert Dr. Dennis Weisenburger offered testimony regarding the potential causes
14 of the Pilliods' NHL. After conducting a differential diagnosis, Dr. Weisenburger opined that Mr.
15 and Mrs. Pilliod's NHL was caused by their exposure to glyphosate and obesity. Hoke Decl. Ex. A;
16 Trial Transcript at 2768:19-2769:6; 2778:4-7, 2784:24-25.¹ As he explained:

17 So that leaves us with Roundup and obesity. And obesity is what I would call a minor risk
18 factor for non-Hodgkin's lymphoma. The odds ratio for those people who are obese is about
19 1.3. And we don't really understand for sure how that happens. Probably the metabolism of the
20 individual is disturbed, and that can influence the lymphocytes. But the risk is pretty small,
21 okay? Obesity, the risk is about 30 percent. And so I would call obesity -- I would call it a
minor risk factor. It may have contributed to her lymphoma, but it wasn't a substantial
contributing cause. On the other hand, Roundup causes an odds ratio greater than 2 in people
who are highly exposed like she was.

22
23 *Id.* at 2777:11-25.

24 Dr. Weisenburger also noted that Mrs. Pilliod had previously been diagnosed with
25 Hashimoto's thyroiditis, an autoimmune disease which is a recognized cause of NHL. *Id.* at 2852:12-
26 2853:7. Dr. Weisenburger, however, offered testimony as to why, in his opinion, he was able to rule-
27

28 ¹ Similarly, Dr. Nabhan will also offer an opinion that Roundup is the most substantial contributing factor to the Pilliods' NHL but that obesity may have also contributed.

1 out Hashimoto's thyroiditis as a contributing factor to Mrs. Pilliod's NHL. *Id.* at 2776:24-2777:10
2 Monsanto's causation experts, Dr. Celeste Bello and Dr. Alexandra Levine, will opine that the
3 Pilliods' exposure to Roundup did not contribute, in any way, to the Pilliods' development of NHL.
4 Indeed, the testimony from Monsanto's experts will be that exposure to glyphosate-based herbicides
5 (GBHs) do not cause NHL generally and, therefore, could not have contributed to their development
6 of cancer. Accordingly, Dr. Bello opines that Mrs. Pilliods' NHL is idiopathic, caused by some other
7 independent factor. Dr. Levine opines that Mr. Pilliods' NHL was independently caused by a
8 weakened or abnormal immune system. As Dr. Levine testified at her deposition:

9 I'm saying that, given the totality, the clinical syndromes that he's had, the clinical
10 illnesses that he's had, the recurrence of his clinical illnesses that he's had, the most
11 likely explanation to me is what is known to be one of the factors with those skin
cancers and with the lymphoma, and that is a weakened or abnormal immune system.

12 Hoke Del. Ex. B; Deposition of Alexandra Levine: 106:16-22. Dr. Levine also intends to testify that
13 Epstein-Barr virus, a recognized cause of NHL, could be the cause of Mr. Pilliod's NHL because his
14 Epstein-Barr pathology results were "equivocal."

15 **B. The Court Should Not Instruct the Jury on "But-For" Causation as the Jury Has
16 Been Presented with Evidence of Concurrent Independent Causes**

17 The current causation jury instruction is CACI No. 430 which provides:

18 A substantial factor in causing harm is a factor that a reasonable person would consider
19 to have contributed to the harm. It must be more than a remote or trivial factor. It does
not have to be the only cause of the harm.

20 CACI 430. The Supreme Court of California has recognized that the "substantial factor test subsumes
21 the but-for test" and would thus produce the same result in the "great majority of cases." *Major v.*
22 *R.J. Reynolds Tobacco Company*, (2017) 14 Cal. App. 5th 1179, 1195. However, as there is still a
23 place for but-for causation in a limited number of cases, the but-for test was not removed altogether
24 from California law. The Judicial Council of California therefore included an optional final sentence
25 in CACI 430 which instructs the jury on "but-for" causation providing that, "Conduct is not a
26 substantial factor in causing harm if the same harm would have occurred without that conduct." The
27 instruction's Use Note explicitly noted that "the 'but for' test of the last optional sentence does not
28 apply to concurrent independent causes, which are multiple forces operating at the same time

1 independently, each of which would have been sufficient by itself to bring about the same harm.”

2 CACI 430, Directions for Use.

3 The jury will hear testimony that could support a finding of concurrent independent causes.
4 Concurrent independent causes are two or more “causes which concur to bring about an event when
5 either one of them operating alone could have been sufficient to cause the result.” *Major*, 14 Cal.
6 App. 5th at 1198. In *Major*, plaintiffs’ expert witnesses opined that plaintiff’s lung cancer was caused
7 by cigarettes manufactured and sold by defendant. The cigarette manufacturer defended the case by
8 arguing that plaintiff’s cancer could be attributed to plaintiff’s “smoking of other cigarettes combined
9 with his asbestos exposure.” *Id.* at 1186. Plaintiff conceded that asbestos exposure may have
10 contributed to his lung cancer but that smoking was the most substantial factor. *Id.* The appellate
11 court affirmed the trial court’s causation instructions which included CACI 430, without the “but-for”
12 sentence and CACI 431.

13 Notably, the appellate court in *Major* held that the “but-for” instruction should not have been
14 given even if the only concurrent independent causes were smoking and asbestos exposure. The Court
15 stated:

16 The parties appeared to go off on a tangent on whether asbestos exposure and cigarette
17 smoking were “dependent” or “independent.” This was mistaken. The issue is not
18 whether the causes were dependent or independent; “concurrent independent causes”
19 is a term of art, used to refer to the situation of two forces each sufficient to bring about
the harm. The parties could have just as easily considered whether the causes were
“multiple sufficient causes,” a term some courts have used.

20 *Id.* at 1197, footnote 8. The fact that smoking and asbestos may have acted “synergistically” wasn’t
21 the central issue in deciding whether the jury instructions should include the optional last sentence on
22 but-for causation.² Smoking and asbestos are “concurrent independent causes” because both forces
23 could be sufficient to bring about the harm – therefore, the “but for” language must be excluded.

24 In fact, the directions contained in CACI specifically state:

25 The “but for” test of the last optional sentence does not apply to concurrent independent
26 causes, which are multiple forces operating at the same time and independently, each of
27 which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet*
(2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen*

28 ² This would be relevant as to whether CACI 431 should be given. As explained below, it should be
given in this case.

(1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].

CACI 2019, p. 283. Likewise, Monsanto's evidence and arguments would require that Roundup exposure, Hashimoto's, Epstein-Barr Virus, and a weakened immune system all be considered "independent concurrent factors" as each would be sufficient to cause NHL. Accordingly, the optional last sentence of CACI 430 on but-for causation should not be given in this case.³

C. The Court Should Instruct the Jury with CACI 431 as the Evidence Also Supports a Finding of Concurrent Dependent Causes

A defendant cannot avoid responsibility just because some other condition or event was also a substantial factor in causing the plaintiff's harm. *See CACI 431; Sources and Authority, Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187. It is sufficient that defendant's negligence "is a legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious." *Uriell v. Regents of University of California*, (2015) 234 Cal.App.4th 735, 747. Under these circumstances, the Court should instruct the jury using CACI 431: Multiple Causes. "Failure to give an instruction on concurrent and multiple causes, where appropriate, is reversible error." *Id.*

It is well-established that a Plaintiff's own physical condition can be the contributing cause that implicates CACI 431. In Uriel, plaintiff argued that defendant's negligence was a substantial factor in causing the decedent to die 10 years earlier than she would have if she had been timely diagnosed and treated. The fact she had cancer, which acted concurrently, as another substantial factor in causing her death, did not relieve the Regents of liability. CACI No. 431 properly explained this issue of concurrent substantial causes to the jury. *Id.*

This principle has long roots in California law. In *Hughey v. Candoli*, a victim's own biological susceptibility was found to be a concurrent:

If it were conceded that defendant had established as matter of law that congenital heart disease was a cause of death of this baby, that did not preclude a recovery by plaintiffs, for defendant's proof showed two concurring causes, atelectasis and heart disease.

³ There would be no prejudice to Monsanto by not including the last sentence as the substantial factor test subsumes “but-for” causation.

Assuming that the heart defect was prenatal and in no wise affected by the accident, it nevertheless appears that that was not true of the atelectasis. We have then concurring proximate causes, one of which flowed directly from the negligence of defendant. In this situation the concurrence of the nontortious cause does not absolve defendant from liability for the tortious one.

(1958) 159 Cal. App. 2d 231, 240, 323 P.2d 779; *See also Kerby v. Elk Grove Union High Sch. Dist.*, (1934) 1 Cal. App. 2d 246, 252, 36 P.2d 431 (1934) ("But if the rupture of the artery was in fact caused by the blow of the basketball, and that act of throwing the ball could be charged to the negligence of the agent of the school district, liability might follow, even though the blow merely aggravated or accelerated the physical defect which had previously existed,")

In *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1158-1159, a medical malpractice case, Plaintiffs alleged the decedent suffered from a blood clot because of the Defendants' negligence. *Id.* The defendants, however, asserted "that nothing [defendant] did caused [decedent]'s death. That unfortunate outcome ... was due to the fact of her morbid obesity, her sedentary nature..." *Id.* Over Plaintiffs' objection the trial court failed to instruct the jury on concurrent causes. *Id.* The appeals court overturned the decision, holding that the failure to instruct the jury on concurrent causes was in error and prejudicial to Plaintiff, holding that defendant's argument regarding alternate causes:

...highlight the serious consequences which can flow from a failure to give a concurring causation instruction ... the jury was never told how to evaluate, weigh, or compare those causes. Rather, it was led to believe, based on defense counsel's argument, that a number of causes mandated a defense verdict.

Id. at 1163.

As Plaintiff's experts testified, the Pilliods' obesity likely contributed to their development of NHL, however, it was their exposure to Roundup that was the most substantial contributing factor. The fact that the Pilliods' may have been pre-disposed to the development of NHL by obesity, weakened immune system or otherwise does not result in a finding for Monsanto on causation. It is CACI 431 that properly instructs the jury on how to consider these multiple causes.

D. CACI 435 Should Be Used To Explain The Medical Probability Standard For Causation

This case involves issues relating to cancer causation including latency between Plaintiffs' exposure and their onset of the cancer. These are exactly the same issues presented to juries in claims

1 involving asbestos-related cancers. Due to difficulties in proving causation for asbestos-related
2 diseases, including the long latency period, the California Supreme Court altered the causation
3 standard for such claims in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d
4 16 (*Rutherford*). In *Rutherford*, the Court concluded that an asbestos plaintiff need only prove “that
5 exposure to the defendant’s asbestos products was, in reasonable medical probability, a substantial
6 factor in causing or contributing to his risk of developing cancer.” 16 Cal. 4th at 957-58.

7 In light of *Rutherford*, California adopted CACI 435 to clarify the standard relating to the
8 medical probability that exposure to a carcinogen was a substantial factor in causing a plaintiff’s
9 injury. CACI 435 provides:

10 A substantial factor in causing harm is a factor that a reasonable person would consider
11 to have contributed to the harm. It does not have to be the only cause of the harm.

12 Plaintiffs may prove that exposure to Roundup was a substantial factor causing their
13 illness by showing, through expert testimony, that there is a reasonable medical
14 probability that their exposure was a substantial factor contributing to their risk of
developing cancer.

15 Although CACI 435 was initially used for asbestos litigation, California courts have confirmed
16 that *Rutherford* is not limited to asbestos litigation and would apply in cases involving exposure to
17 other carcinogens. See *Major v. R.J. Reynolds Tobacco Co.*, 14 Cal. App.5th at 1198 (“there is no
18 reason that *Rutherford* would apply in cases of asbestos exposure and multiple toxic substance
19 exposure, but not exposure to carcinogens in cigarettes.”); *Bockrath v. Aldrich Chemical Co., Inc.*,
20 (1999) 21 Cal. 4th 71 (applying the *Rutherford* standard of causation (CACI 435) to cancer caused by
21 long-term exposure to toxins); *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 700-701
22 (finding that *Rutherford* would appear appropriate for injuries caused by carcinogens in cigarette
23 smoke).

24 There is no substantial difference between the evidence in this case and the asbestos cases
25 using CACI 435. CACI 435 will clarify how to apply the “substantial factor” test here, where the jury
26 is asked to navigate issues of exposure and latency in determining whether there is a reasonable
27 medical probability that Roundup was a substantial factor in causing the Pilliods’ cancer. For these
28 reasons, CACI 435 should be given in addition to 430 and 431.

1 **III. CONCLUSION**

2 For the foregoing reasons, this Court should instruct the jury on causation by providing CACI
3 431 and 430 without the optional last sentence on "but-for" causation. Furthermore, the Court should
4 provide CACI 435 to further clarify how to apply the substantial factor test to causation claims.

5
6 Dated: April 22, 2019

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PROOF OF SERVICE

2 | STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 10940 Wilshire Blvd., 17th Floor, Los Angeles, CA 90024.

5 On April 22, 2019, I served the foregoing document described as: **PLAINTIFFS' TRIAL**
6 **BRIEF ON CAUSATION JURY INSTRUCTIONS** on the interested parties and/or through their
7 attorneys of record by depositing the original or true copy thereof as designated below, at Los
Angeles, California, addressed to the following:

8 **(X) E-MAIL OR ELECTRONIC TRANSMISSION:** In accordance with the Court's Order
9 (CMO No. 2) governing Case No. JCCP 4953 authorizing all documents to be served electronically
upon interested parties via Case Anywhere and its litigation system.

10 (X) I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

12 Executed on April 22, 2019 at Los Angeles, California.

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